IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1649

LLOYD F. EARLY,
Petitioner

v.

PALM BEACH NEWSPAPERS, INC., GREGORY E. FAVRE, ROBERT H. KIRKPATRICK, JANE ARPE AND TOM SAWYER,
Respondents

On Petition for a Writ of Certiorari to the District Court of Appeal for the State of Florida, Fourth Judicial District

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REPLY BRIEF OF PETITIONER

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Dated: September 13, 1978

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I.

INTRODUCTION

Respondents emphasize that although the Petition for a Writ of Certiorari (filed with this Court May 20, 1978) was properly titled, it was nevertheless "erroneously addressed to the Supreme Court of Florida" in the first sentence "and should [have been] addressed to the [Florida] District Court of Appeals." Reply Brief of

Respondents, p.2 (June, 1978). It was, however, the State's Supreme Court which rendered the most recent, final decision. On the heels of that decision, we now respectfully request this Court to take such action which it sees fit to redress the effect of the erroneous decision of the court below. We ask first that this Court grant the Petition for a Writ of Certiorari, review the instant proceeding on the merits, reverse the decision of the Florida District Court of Appeal, and reinstate the judgment and jury verdict of the trial court. In the alternative, Petitioner requests that this Court, after granting a writ of certiorari, remand this action to the Florida District Court of Appeal for reconsideration in the light of arguments presented in the pending Petition for Certiorari. Finally, we respectfully ask that this Court grant the Petition for Certiorari and remand to the Florida Supreme Court, ordering it to take jurisdiction of the instant action. It was to this end that Petitioner "addressed" the petition to that court.

The Petition for a Writ of Certiorari was in response to the final judgment of the Florida Supreme Court, although this Honorable Court well knows that the above-described avenues of review lay open to it should it grant certiorari and review the instant proceeding. For Respondents to protest so vigorously such a slight deviation from standard practice, one barely rising to the level of "procedural," is to prefer form over substance in an attempt to deflect this Court's attention from the crucial issues in this action. We urge this Court to address the issues and not become diverted by the needless injection of this defense into the present action by Respondents.

Should this Court require the Petition for a Writ of Certiorari expressly to state that it is "to review the decision of the Florida District Court of Appeal, Fourth District" (as it does in the title) rather than of the court immediately below we urge the Court to consider this

section of this Reply as a request either to amend the words on page one of said Petition to so read, or for the Honorable Justices of this Court simply to read them as such in granting the petition before them.

II.

ARGUMENT

The Florida District Court of Appeal erred in reversing the judgment of the trial court and jury verdict for Petitioner. It utterly misinterpreted and to an astonishing degree ignored the evidence indicating actual malice (as defined by *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710 [1964] and expanded upon by subsequent decisions) on the part of Respondents in waging their campaign to have Petitioner removed from office. Even assuming there was no more evidence to that effect than was cited by the District Court of Appeal in its decision, the court nonetheless erred in substituting its evaluation of that evidence for that of the trial court.

The District Court of Appeal examined a mere "smattering" of the many articles introduced at trial. Petition for a Writ of Certiorari, App. c at 13a. Careful scrutiny of those articles and their personal observation of witnesses lead the jury to award Petitioner both compensatory *and punitive* damages. The trial judge, similarly privileged to see and hear first hand the articles and testimony relating thereto, noted that if these Respondents bore the protection of *New York Times* v. *Sullivan*, *supra*, "public officials [would be] completely barred from successful libel actions." *Id.*, p. 15 (May 20, 1978). It is, therefore, difficult to fathom the District Court of Appeal's finding that "no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense." *Id.*, App. C. at 11a. Innumerable cases have reminded that "it is not the province of the District

Court of Appeal to substitute its judgment for that of the trier of facts." *Littel* v. *Hunnicutt*, 310 So. 2d 45 (1975). Yet the appeals court found that, "in the light most favorable to the verdict," *Cape Publications, Inc.* v. *Adams*, —— So. 2d —— (Fla. 4th DCA, August 27, 1976), no evidence existed to show either that the published statements were defamatory or that they were made with "actual malice." Without recounting the evidence of the charge of nepotism (*see* Petition for a Writ of Certiorari, p. 14), we respectfully offer that article as but one example of the legion of articles justifiably found by the trial court to be published with reckless disregard of their truth or falsity, or with knowledge that they contained falsehoods. To allow the District Court of Appeal to presumptiously jettison the trial court's reasoned decision for its own ill-considered one would be a drastic setback to our orderly judicial process and, in this case, to the careful substantive evolution of the cases interpreting *New York Times* v. *Sullivan*. Procedurally then, the court below erred; its decision should be reversed here, or the case remanded to either appellate court below for reconsideration.

On the merits alone, this Court could also reverse the District Court of Appeal decision. The opinion of this Court in *New York Times* v. *Sullivan, supra*, was directed at precisely the type of malicious and libelous course of publication practiced by Respondents. While reaffirming the press' First Amendment right to report the news and engage in admittedly biased, often violent and at times antagonistic comment on public matters, *Garrison* v. *Louisiana*, 379 U.S. 64, 85 S.Ct. 209 (1964), the Court in *Sullivan* held the news media responsible for defamatory statements concerning a public official where "the statement[s] [were] made with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." (376 U.S. 254, 279-80, 84 S.Ct. 710, 726 [1964]).

The Court, in *New York Times* v. *Sullivan, supra*, and in numerous subsequent cases, has at no time distinguished between editorial opinion and factual news reporting in applying the standard it propounded. *Any* defamatory falsehood relating to a public official, published with knowledge of its falsity or with serious doubts as to its truth, *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S.Ct. 1323 (1968), whether reported as news or couched in editorial commentary, meets the "actual malice" test for actionable libel set forth in *Sullivan*. Respondents, however, hide behind the unfounded contention that all of their publications are absolutely privileged inasmuch as many (although admittedly not all) of the articles are editorials or editorial cartoons, representing only the opinion of the publishers, thereby allegedly rendering them immune from attack as factually untrue. The irrelevance of any distinction between factual reporting and published opinion where both are pursued with "actual malice" has been emphasized consistently by this Court. "All discussion and communication involving matters of public and general concern" must satisfy the criteria announced in *New York Times* v. *Sullivan, supra*. *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 44, 91 S.Ct. 1811, 1820 (1971).

We ask this Court to grant the Petition for Certiorari and review the numerous news articles, editorials, editorial cartoons, and "news articles" carrying editorial messages which were published in a ruthless attempt to oust Petitioner from office. During this onslaught, Respondents advanced facts they knew to be false, and evidenced a reckless disregard of the truth or falsity of many other printed allegations. *See*, Petition for a Writ of Certiorari, p.14 n.2. Yet the court below, after perusing only a "smattering" (*Id.*, App. C. at 13a) of the many articles which the trial court jury fund to evidence actual malice, declared that "these charges were clearly matters of opinion, not statements of fact." *Id.* at 11a. The

Florida District Court of Appeal apparently ignored its own finding that many of the articles were "news articles" (*Id.* at 8a). Even if we assume, *arguendo*, that the news articles contained editorial opinions, they nonetheless should not be afforded protection if those opinions are based upon, and interspersed with factual reports which, through calculated falsehood or reckless unconcern as to their truth or falsity, are designed to paint a false or tainted picture of the official, *see Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465 (1974); *Varnish* v. *Best Median Publishing Co.*, 405 F. 2d 608, 611-12 (2d Cir. 1968), *cert. denied*, 394 U.S. 987, 89 S.Ct. 1465 (1969), or malign the character of the official through false innuendo and accusation made with actual malice, *see Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967). In short, to insulate from liability Respondents' libelous campaign against Petitioner by simply labelling *some* of the articles "editorials" and thereby somehow affording *all* the articles (although all were not even read by the court) absolute immunity is to stand the well-established theory of *New York Times* v. *Sullivan* and its progeny on its head. While editorial opinion is one of the chief benefactors of the First Amendment freedom of the press, (". . . there is no such thing as a false idea," *see Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997 [1974]), false statements made with actual malice, while masquerading as, or forming the basis of editorial opinions, do not warrant constitutional protection. Respondents in effect advance a "right to fabricate" behind the First Amendment shield of the public's "right to know." This advance must be halted.

The court below erred gravely in holding that "many of the written articles and cartoons, caustic and pejorative as they were, nonetheless had a basis in fact and thus were not false . . ." Petition for a Writ of Certiorari, App. C, at 11a. The Florida District Court of Appeal thereby indicated that as long as it contains some

modicum of truth, an entire article will be deemed automatically devoid of falsehood. It is not difficult to discover articles, judicially declared to be libelous, which are free from defamatory statements except for one isolated phrase or sentence. The court cannot ignore the libelous remark any more than a reader is likely to, nor may it base its decision on the ratio of truths to falsehoods contained in the article. The court's finding that any article with any "basis in fact" cannot be false in any way is clearly erroneous and must be either remanded for review below or reversed by this Honorable Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted and the decision of the Florida District Court of Appeal reversed, or in the alternative, the case remanded either to the Florida District Court of Appeal for reconsideration in the light of said Petition, or to the Florida Supreme Court with orders to take jurisdiction of the action.

Respectfully submitted,

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